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It is pointed out that Americans will be attempting an energetic correction, by Federal effort, of some of the racial troubles which beset them in northern cities and in more rural southern areas. Factors contributing to this trend are an awakened national conscience; a marked tendency to undertake, by public means, matters once thought suitable only for private enterprise; a shift from local or State public action to national measures; and immense national resources on which to draw.

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Sutherland

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Constitutional Change and Social Conscience

Arthur E. Sutherland

Sometimes we Americans think so reverently about our Charter, drawn up in Philadelphia in 1787, that we forget the variety of meanings that attach to the term "constitution." An Englishman hears the word with overtones quite different from its ordinary connotations for us. He uses "the British constitution" to mean his people's habitual way of governing themselves, their deep-rooted ideas of what is fair and reasonable in the perennial adjustment of freedom to authority, of the individual's responsibility and the government's provision for him.

On our side of the Atlantic we Americans have, in addition to our properly-revered Constitution of 1787 and its carefully-drawn amendments, another equally important constitution in the English sense. Both of our American constitutions change; sometimes the one changes more rapidly, sometimes the other. In this short essay I suggest that in our time—which is to say in the last century or so—our concept of just government has notably turned its course toward more human sympathy, part of a movement going on, in one way or another, all over the world. The journal for which these words are destined is concerned with the schooling of the young; and of course constitutional movement in our time affects schools along with the rest of our society. Perhaps we teachers do well to remind ourselves, now and then, of the depth and width of the current that is carrying us with it.

When the Supreme Court, on May 17, 1954, decided the School Desegregation Cases, it was doing something which to many Americans seemed a sudden and startling departure from the past. That the decision was an optional innovation I doubt—and the Court's unanimity in the School Cases bears me out. With one possible and temporary exception, the Supreme Court had not since 1927 upheld any law or governmental practice prejudicial to the Negro because of his race. The School Cases of 1954 only registered and made evident a deep change, long in process. And the change was, and is, a continuing development in far more than race relations. We have been undergoing a pervasive increase in sympathy, an inability to tolerate distress in others, of which our changing attitude toward race is only one conspicuous manifestation.

It would be too easy to write off, as phenomena of electoral politics, our "social security" against the hazards of impoverished old age, our ubiquitous publicly-subsidized housing, our workmen's compensation, our projects for medical care at public expense, President Johnson's proposal to "abolish poverty" and its favorable reception in Congress, and the like. Such a facile ascription to "politics" overlooks the circularity in majoritarian political motivation; politicians advocate low-cost housing and slum clearance because the advocacy is popular, one may assume; but the popularity itself is a significant fact. The willingness of great masses of people to tax themselves in order that a small part of the total populace may have some outlet to decency of existence from an utterly sorry state is, in the long perspective of history, a comparative novelty.

On the whole this movement is unselfish. There are few votes to be gained by young people who join the Peace Corps. In 1919 college students lunched once a week on prunes and bread with a happy sense that in some mysterious way money thereby saved would go to feed the starving Armenians. One could multiply examples; indication of conspicuous exceptions does

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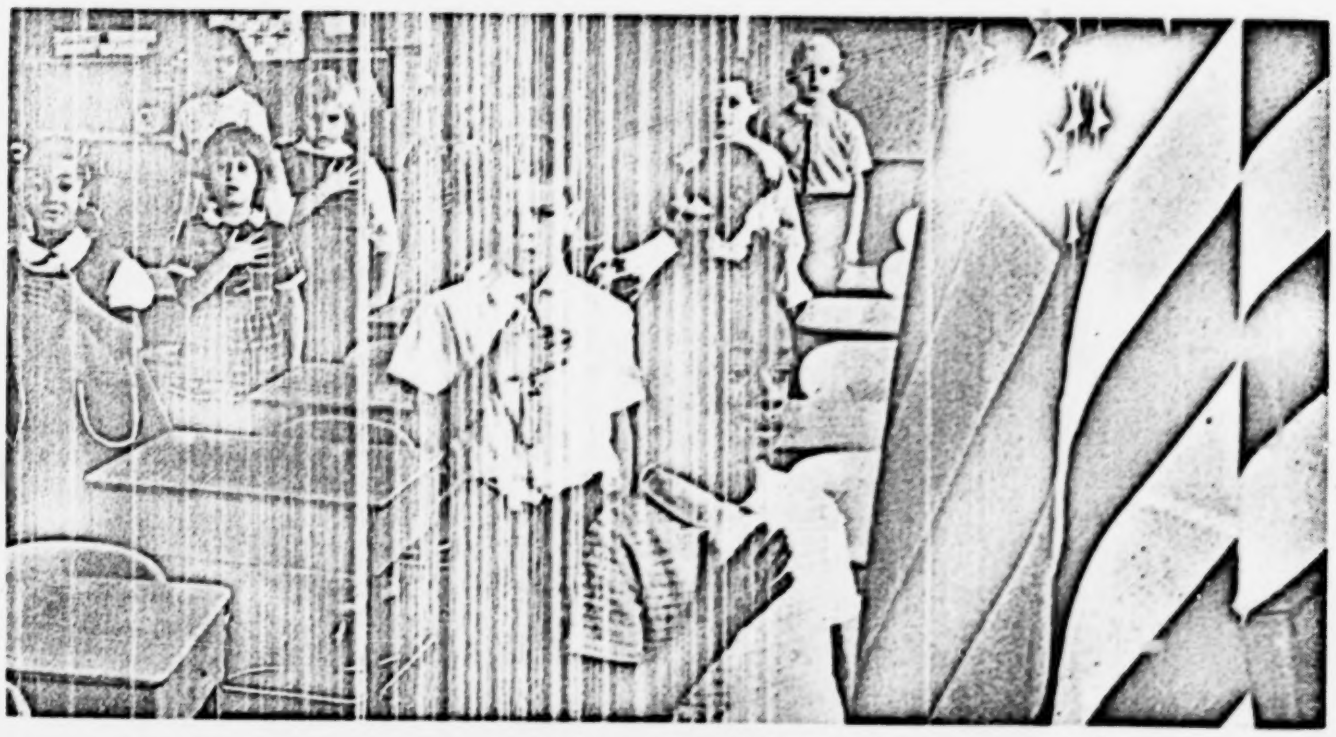
not show the absence of a trend. Conditions in today's Mississippi do not negate the underlying significance of the Civil Rights Act of July 2, 1964, or its passage by striking majorities in both Houses of Congress.

We are, then, in the midst of a pervasive constitutional change, and those of us who have direct concern with the schooling of the young do well to understand its directions, its dimensions, its manifestations. It will, in this way or in that, control our actions; and a man does better in the work of his life if he is conscious of the forces that govern his duty and his fate.

Two manifestations of this change are conspicuous. One is a tendency, seen in every part of the country, to do by public means what we used to think suitable only for private enterprise. When Herbert Spencer wrote his *Social Statistics*, over a century ago, he suggested the utopian character of improved dwellings for the poor by pointing out that if landlords could make no money by them, they would not invest. He made no mention of the possibility that general taxation could raise the money; one supposes that such a horrid proposal would have profoundly shocked him, and did not occur to him. He was already shocked by the spectacle of schooling at public expense, and demonstrated, in an imaginary dialogue, its utter injustice when it resulted in taxation of parents who preferred (like Spencer's parents) to school their son privately. His logic has not prevailed; we tax ourselves for housing, transportation, doctoring, schooling, amusements, the arts, and (for soldiers, delinquent children, Members of Congress, prisoners in correctional institutions, and other special groups) for salvation of souls by public provision of chaplains. I do not enumerate these few instances, among many, out of any disregard or disrespect. I doubt the feasibility of running the New York subways by private investment; private landlords have not made a conspicuous success of slum clearance in Harlem. And furthermore, where enterprises remain in private hands they come more and more under public control—from the New Haven Railroad to a "place of public accommodation" described in Title II of the Civil Rights Act of 1964! The trend seems evident. *Si exemplum requeris, circumspice!*

Equally notable is a related constitutional phenomenon: the shift in performance of public functions from local and state entities to the national government. When Holmes wrote his Child Labor dissent in 1918, he argued for the constitutionality of federal legislation on the ground that a "self-seeking State" tolerating factory work by children should be required to give way to an Act of Congress serving the welfare of the nation as a whole. He said with sympathetic moral indignation that if the Congress could prohibit the interstate shipment of liquor, it could similarly restrict "the product of ruined lives." Perhaps few governmental episodes in recent history are more significant than the Supreme Court's repudiation of its Child Labor decision in the 1941 *Darby Lumber Company* case. Twenty-three years had demonstrated that Holmes had been right in 1918.

We have hitherto been readiest to assert Congressional authority in matters obviously economic or military. The national legislature has been slower in supporting those claims on society to which we sometimes give the facile name of "human rights." Thus the Congress waited from May 17, 1954, until July of 1964 to



implement, by federal assistance, the School Desegregation Cases. And even in 1964 we have not yet undertaken to marshal the whole of our national resources to eliminate the misery in parts of our cities which occasionally erupts in desperation. *The New York Times* of Sunday, August 2, 1964, describing the week's news, tells on one page of twenty billion dollars spent on space exploration during the past six years, and in another column on the same page discusses race riots in our cities. "The basic difficulty," says the *Times* commentator of this rioting, "was that bolder action than the cities could finance out of their own budgets was necessary."

The effect of these three factors—an awakened national conscience that leads us to attempt remedies for ills of our people, a marked tendency to undertake by public means matters we once thought suitable only for private enterprise, and a shift from local or state public action to national measures—these three, and immense national resources on which we can call, all indicate that sooner rather than later we shall be attempting an energetic correction, by federal effort, of some of the racial troubles which beset us, in northern cities and in more rural southern areas.

A chronic American political trait is the oversimplification of public problems. Some of us can remember college students in 1945 and 1946 who became impatient with certain of our national foreign policies that seemed to them too nationalistic, and said, with innocent earnestness, that the United Nations ought to tend to things. So now, when difficulties arise in our states, ascription of a remedy to the federal government gives a comforting sense of simplicity. As I have already suggested, I think that race problems, with urban problems generally, have attained dimensions which only national effort can solve. But once this fact is recognized, once conviction of its truth has impressed a majority in the Congress, we shall only have begun. Political obstacles will remain. Men like to do things in their own ways; they resent being displaced in authority by bureaucrats (a 'bureaucrat' may be defined in the same terms as an 'expert'—that is, a man out of town!). This is particularly so when the public action in question consists in spending money. And even when these jealousies of competing officialdoms are overcome, the stark questions of what to do and how to do it will face the functionaries. Our cities are, in spots, too densely crowded. Agreed; but surely we do not propose mass deportation and resettlement such as occurred between Turkey and Greece in the early 1920's, or a repetition, no matter how benign, of the "Japanese exclusions" we carried on in California in 1942. Ours is, after all, a free country.

And even if local prejudice and human resistance to change are overcome, schoolmen will still have puzzling difficulties. When the Supreme Court handed down its decision on *Bolling v. Sharpe* on May 17, 1954, the then President immediately ordered that the District of Columbia schools be desegregated, and his orders were carried out. The adjustment has not been simple, for the pooling of races in the same classroom is only one single element in a complex situation. When a Dutch ship brought a cargo of Negro slaves from Africa to Jamestown in 1619, it began a train of circumstances that has continued to make trouble for three and a half centuries.

Credulous faith in simple remedies now plagues us. "Education is the solution," we say to ourselves. Perhaps, using that phrase in its widest sense—in its etymological fullness of meaning, far transcending the classroom—perhaps we are right. In this matter all our pupils, Negro and white, and our teachers and our officials, local and national—indeed all of us, the people of the United States, need to be led out of our habits of timidity and negativism. For the theory and law and tradition of our Constitution call for a wise union of tradition and progression. Of the country could well be said what has been said of its oldest university, that it is a community of memory and of hope. Today we are much in need of both.

Arthur E. Sutherland is Bussey Professor of Law at Harvard. His article comes from a talk delivered at the HGSEA New York regional meeting held last May, where Professor Sutherland was the keynote speaker.